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SUPREME COURT OF THE UNITED STATES

October Term 1958

MARVIN IRVING TAMARKIN,

Petitioner

-vs-

UNITED STATES OF AMERICA

Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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LEONARD EDWARD ABEL
Counsel for Petitioner
420 Lincoln Road
Miami Beach, Florida

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TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of conviction of petitioner by the United States District Court for the Southern District of Florida for a violation of the Universal Military Training and Service Act.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. (See Appendix A, page 1, infra, for opinion). The opinion of the District Court is unreported. (See Appendix B, page 1, infra, for opinion.)

JURISDICTION

The judgment and mandate of the Court of Appeals was entered in this case on January 7, 1959. A petition for rehearing was filed on December 5, 1958. The petition for rehearing was denied without opinion on December 17, 1958. The time for filing this petition expires on January 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254 (1). (See also Rules 37 (b) (2), and 45 (a) Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U.S.C.A. Section 3231.

QUESTIONS PRESENTED

I

Did the Selective Service Appeal Board properly apply the law to the facts and the facts to the law when, on July 2, 1956, they considered the appeal of the Petitioner?

II

Since the regulations require that when a registrant's classification was reopened and considered anew by his Local Draft Board, such classification shall be, and have the effect, of a new and original classification, did the Local Draft Board deny the Petitioner procedural due process of law by holding that he was not entitled to a new physical examination and the 21 day waiting period thereafter before ordering him to report for induction because he had been given a physical examination and the 21 day waiting period in a previous classification which had no bearing on or relation to his present classification?

III

The fact that the petitioner's classification was reopened and considered anew having heretofore always been accepted by the parties hereto, and it never having been controverted between the petitioner and the Government, the record being devoid of such controversy, can the Court of Appeal, on its own motion and without giving Counsel for the parties the opportunity to consider or argue the point, interject a holding which finds as a matter of law that the petitioner's local board classification was not reopened and considered anew in the face of his Selective Service record which says that it was?

SELECTIVE SERVICE REGULATIONS INVOLVED

Part 1625 — Reopening and Considering Anew Registrant's Classification.

"Authority: 1625.1 to 1625.14 issued under sec. 10, 62 Stat. 618, as amended: 50 USC App., 460.

"Source: 1625.1 to 1625.14 contained in E.O. 9988, 13 F.R. 4874, Aug. 21, 1948, except as otherwise noted. Redesignated act 14 F.R. 5021, Aug. 13, 1949.

"1625.2 When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Classification Anew.

"1625.11 Classification considered anew when reopened. When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

"1625.12 Notice of action when classification considered anew. When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant mail notice thereof on Notice of Classification (SSS Form #111) to the persons entitled to receive such notice or advice on an original classification under the provisions of 1623.4 of this chapter.

"1625.13 Right of appeal following reopening of classification. Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

"1625.14 Order to report for induction to be canceled when classification reopened. When the local board has reopened the classification of a registrant, it shall cancel any order to Report of Induction (SSS Form #252) which may have been issued to the registrant. If after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner."

Section 1628.10—"Who will be examined."

Authority: sections 1628.1 to 1628.26 issued under sec. 10, 62 Stat. 618, as amended; 50 USC App. 460.

"Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

(E. D. 18292, 16 F.R. 9862, Sept. 28, 1951.)

Quotas and Calls.

Authority: Sec. 1631.1 to 1631.7 issued under Sec. 10, 62 Stat. 618 as amended; 50 USC App. 460.

Section 1631.7—"Action by local board upon receipt of call."

"Each local board, upon receiving Notice of Call on Local Board (SSS Form #201) from the State Director of Selective Service for a specified number of men shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class 1-A and Class 1-A-O and have been found acceptable for service in the armed forces and to whom the local board has mailed a certificate of Acceptability (DD Form #62) at least 21 days before the date fixed for induction: . . ."

(Paragraph (a) amended by E. O. 10659, 21 F.R. 1103, Feb. 17, 1956.)

Classification Rules and Principles.

1622.14 Class I-O Conscientious Objector.

(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

(E. O. 10292, 16 F.R. 9862, Sept. 28, 1951, as amended by E.O. 10420, 17 F. R. 11593, Dec. 19, 1952)

National Headquarters Selective Service System, Local Board Memorandum #28, paragraph 2 (a):

"Except in the cases of posponed registrants, the 120 day period of validity continues in effect for armed

forces physical examinations. However, when a registrant whose physical examination is more than 120 days old is selected for induction, the local board shall not order him to report for armed forces physical examination but shall order him to report for induction. In each such case the registrant will receive a complete examination at the armed forces examination and induction station and when found acceptable will be immediately inducted."

STATEMENT OF THE CASE

This criminal action was brought by indictment charging petitioner with a violation of the Universal Military Training and Service Act. (50 U.S.C. App. Sec. 462.) Petitioner was charged with refusing to submit to induction. Petitioner pleaded not guilty to the charge. Prior to trial the petitioner stipulated with the government that he refused to submit to induction.

The case proceeded to trial before the judge without a jury, which was waived. Testimony was received and documentary evidence (Government Exhibit #1) was admitted into the record. The petitioner filed a supporting brief asserting two defenses to the charge.

A motion for judgment of acquittal was made at the close of all the evidence. This motion was denied. The judge found the petitioner guilty, entered a judgment of conviction and sentenced the petitioner to twelve months in the cutody of the Attorney General. The Court filed a written opinion giving reasons why the judgment was rendered (See Appendix B, page 1.)

The case was duly appealed to the Court below. The

case was duly briefed, argued, and submitted, resulting in an affirmance of the conviction. A petition for rehearing in the Court below was denied.

STATEMENT OF FACTS

The petitioner was born on July 26, 1930. The petitioner first registered under the Selective Service System on September 17, 1948, at the age of eighteen (18). On December 19, 1950, the petitioner was classified 1-A by his Local Draft Board. On March 20, 1951, in accordance with the provisions of Selective Service Regulations seeking reclassification as a Conscientious Objector (4-E). The Local Draft Board held a hearing on that same day the petitioner was classified 4-E. On November 26, 1951, the petitioner's Selective Service System File was forwarded to the Selective Service System State Headquarters pursuant to their request. On December 6, 1951, the petitioner was again classified 1-A by his Local Draft Board. The petitioner took his regular appeals to that classification and on February 6, 1952, the Selective Service System Appeal Board for the Southern District of Florida reviewed the petitioner's Selective Service System File and decided that the petitioner should not be classified as either 1-A or 1-A-O. On April 13, 1954, that same Appeal Board classified petitioner 1-A. On July 30, 1954, the petitioner was ordered to report for induction. He reported but refused to submit to induction. The petitioner was reported as delinquent and prosecution for violation of Selective Service System Regulations was commenced. On September 19, 1955, the United States Attorney for the Southern District of Florida declined to prosecute the petitioner for the alleged violation on the ground that procedural due process of law had been denied the petitioner when the de-

fendant was not given a fair resume of the investigation of his background as made by the Federal Bureau of Investigation. On October 20, 1955, the petitioner's classification was re-opened and considered anew and the petitioner was placed in 1-A. The petitioner appealed this classification and on March 29, 1956, the petitioner appeared before the Honorable Henry K. Gibson, Special Hearing Officer for the Department of Justice. After an extensive hearing conducted by the Hearing Officer, which searchingly investigated the religious training and belief of the petitioner, the Hearing Officer recommended that the petitioner be classified as a Conscientious Objector. The Honorable T. Oscar Smith, Special Assistant to the Attorney General reviewed the Hearing Officer's recommendations and he recommended that the petitioner be classified as 1-A. This the Appeal Board did and on July 6, 1956, the petitioner was officially informed of the Appeal Board's action. Simultaneous with the receipt by the petitioner of his notice of classification, he also received an order to report for induction on July 23, 1956. On July 26, 1956, the petitioner would have become twenty-six (26) years old, and therefore, ineligible for the draft because of over-age. The petitioner duly reported for induction on the required date and some time later that same day he refused to submit to induction. On July 25, 1956, the petitioner was indicted for his refusal. The petitioner waived jury trial and was tried for the offense charged. In an opinion filed on March 6, 1958, by the Honorable Emmett C. Choate, U.S. District Judge for the Southern District of Florida, the petitioner was found guilty as charged. (See Appendix B, page 1.) The petitioner moved to vacate the judgment of guilty and in the alternative moved for a new trial. The trial court denied both motions in an order dated April 8, 1958.

REASONS FOR GRANTING THE WRIT

To save expense for the Government so as not to waste the time of the Court the Petitioner stipulated with the United States Attorney that on July 23, 1956, he refused to submit to induction which act was a violation of Statute for which he was indicted, and for which he was tried. The leading case of **Estep v. United States**, 66 SCT 423, permits a draft classification to be overturned when it has no basis in fact, but not before the criminal prosecution is under way. The Petitioner must first exhaust all of his administrative remedies. **Watkins vs. Rupert**, 224 F2d 47.

The question propounded by the Petitioner to the Court can be restated another way in two parts: Do the beliefs which the Petitioner says he holds amount to the "Conscientious opposition to participation in war in any form" demanded by Congress as a prerequisite to conscientious objection deferment? And, secondly, is the Petitioner sincere when he says he holds these beliefs?

Considering the sincerity question first, the report of the Department of Justice reviewing officer, Mr. T. Oscar Smith, dated May 25, 1956, states on page 6, Givernment Exhitit # 1 that the hearing officer "concluded that the registrant's sincerity was real and actual . . ." The fair resume of the report made by the Federal Bureau of Investigation shows over and over again, in instances too numerous to cite, that the informants believed in the sincerity of the Petitioner. Furthermore, looking at the question from the other direction, there is nowhere in the Selective Service file of the Peti-

tioner any statement or information which makes an allusion to the lack of sincerity of the Petitioner. Where it is admitted that the Petitioner is sincere, the Court is relieved of the task of searching the record for basis in fact to support a finding of insincerity; the sole question remaining in the case is one of law—to repeat, do the beliefs which the Petitioner says he holds amount to the conscientious opposition to participation in war in any form demanded by Congress as a prerequisite to the conscientious objection deferment. **Sicurella vs. United States,** 75 SCT 403.

The beliefs of the Petitioner were first expressed to his Local Draft Board in the special form #150 for conscientious objectors (Government's exhibit #1), then at the hearing before his Local Draft Board on March 20, 1951, when he was granted conscientious objector status, then at the two hearings held before the Department of Justice hearing officers, the second of which, on March 29, 1956, recommended that the Petitioner be granted conscientious objector status, and in the numerous appeals filed by the Petitioner in his own behalf since November 15, 1955. At the two hearings held by the Department of Justice, the Petitioner presented no written material to substantiate his position; the hearings consisted of oral interrogatories propounded by the hearing officers to the Petitioner. It is interesting to note, therefore, that the Local Draft Board, when it reopened the Petitioner's classification and classified him anew as 1-A, on October 20, 1955, used material at least 4½ years old, since they did not ask the Petitioner for any new material, nor, indeed, did they ask him if his views had changed in any way since 1951. Furthermore, they did not request a new special form #150 which seems to be re-

quired if the provisions of Section 1625.11, 32 CFR, are to be complied with. An appeal by the Petitioner to the Local Draft Board requesting reconsideration of the 1-A classification was denied. This appeal was read by them on January 12, 1956. In compliance with the regulations the Petitioner file was forwarded to the Appeal Board who, in turn, forwarded the file to the Department of Justice. Mr. Henry K Gibson, held a hearing and recommended a conscientious objector classification for the Petitioner. The reviewing officer disagreed and recommended 1-A and so the Appeal Board found on July 2, 1956, after the Petitioner had filed a rebuttal to the reviewing officer's recommendation. There is no point in discussing at length the appeals filed by Petitioner, they are in his Selective Service file and are part of the evidence in this case. Let me say, however, that what was stated in the appeals is entirely consistent with the position of the Petitioner ever since he first registered for the draft.

An examination of the Petitioner's special form =150 shows that the Petitioner believes basically in a Supreme Being, is conscientiously opposed to the taking of life, whether animal or human, for any purpose whatsoever, was raised from birth as a strict vegetarian, under no circumstances believes in the use of force, has often given public expression to his views, considers vegetarianism a religious doctrine and the Vegetarian Union a religious sect, and believes that Vegetarianism upholds the sacredness of life as an inviolable principle because it respects the birth right of every creature to life and perfection under the eternal laws of nature, and seeks peace through understanding and universal brotherhood.

Now, these expressions of the Petitioner as made in his special form are fragmentary and certainly do not state completely his religious training and belief. It is inconceivable that a form which provides a line or two for the answer to such profound questions as the requirement to describe the nature of the Petitioner's belief in a Supreme Being, and the tenets or creed of his religious group (question 2, series 2, and question 5e, series 5) can elicit adequate or complete answers sufficient to permit a proper administrative determination respecting the Petitioner's claim. The fuller exposition made by the Petitioner to the Local Draft Board on March 20, 1951, and the hearing officer on March 29, 1956 prompted them to grant him or recommend the classification he sought. The two appeals filed by the Petitioner since November, 1955, and which are evidence in the case consistently expressed the religious training and belief of the Petitioner.

The reviewing officer although admitting that the hearing officer's recommendation was favorable (and also, therefore, the Federal Bureau of Investigation report, since the hearing officer uses the information elicited therein) in his recommendation that the Petitioner's claim be denied stated as his grounds that:

"Although the registrant asserts an individual belief in a relation to a Supreme Being which to him involves duties superior to those arising from any human relation, theviews upon which he bases his claim are essentially philosophical and involve a merely personal moral code." (page 6 of report)

and therefore, the Petitioner did not come within the

meaning of Section 6 (j) of the **Universal Military, Training and Service Act,** as amended which reads in part as follows:

"Religious training and belief in this connection means as individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relations, but does not include essentially policital, sociological, or philosophical views or a merely personal moral code."

The reviewing officer quoted at great length in his report concerning certain tracts and pamphlets the Petitioner gave to his Local Draft Board in 1950 to help explain some of the meaning of vegetarianism. He also cites the Federal Bureau of Investigation report as showing that there was some contention amongst vegetarians themselves as to whether vegetarianism is a philosophy, way of life, or a religion although he admits that almost all of those questioned "generally believed that the (Petitioner) and his family treat vegetarianism as a religion" (Page 4 of report).

The reviewing officer quoted others from the Federal Bureau of Investigation report who purported to give varying interpretations of the meaning of Vegetarianism and then summed up the hearing officer's report as follows:

"The hearing officer reported that registrant belongs to no ordinary religious sect and bases his conscientious objections entirely and solely upon his convictions as a vegetarian and upon his membership in the Vegetarian Society to which he belongs. The registrant asserted a

decided belief in the Bible, passages of which he read to the hearing officer and which he interpreted to be the will of God that no animal including human beings should be killed. He also expressed belief in a Supreme Being and indicated that he regards vegetarianism as a religious belief. The hearing officer reported that the registrant appeared to be thoroughly indoctrinated and was able to explain his attitude in an intelligent manner, and that the two witnesses he presented corroborated his belief, his sincerity and the extent thereof."

The hearing officer pointed out that there is certainly substantial reasoning to support the very plausible argument that vegetarianism is not a religion but is merely a "sociological or philosophical view or a merely personal moral code" under the provisions of section 6 (j) of the Act. However he concluded that "registrant's sincerity is real and actual and that he has submitted very clear evidence that his convistions amount to a religious belief, misguided and erroneous as they might appear." Accordingly, he recommended that the registrant's claim be sustained. (Pages 5 & 6 report.)

Based upon these facts the reviewing officer recommended as he did to the Appeal Board.

The Selective Service file of the Petitioner does not reveal what reasoning the Appeal Board used to arrive at its decision; there is nothing in the Selective Service file except a bare statement of the result of the vote taken. At any rate it can be assumed that the reviewing officers' recommendation bore great weight. That that recommendation was erroneous, there can be no doubt, and the requirement of the Estep case that the classification have a "basis in fact" has not been met.

The reviewing officer completely disregarded the hearing officer's report, the appeal of the Petitioner, and the statements of informants, substituting his own judgment and the opinions of others rather than applying the test directly to the individual (the Petitioner). This is clearly contrary to Section 6(j. which is concerned with the "individual's belief" rather than what others think the "belief" should be, since they, too, belong to the same religious group and they think differently about the question. **United States vs. Everngam**, 102 F. Supp. 128. There is apparent disregard of the statements of these same people who profess the belief that the Petitioner's training and beliefs in vegetarianism are religious in nature.

Assuming that the American Vegetarian Union is an ethical society, must the Petitioner belong to some other religious sect or group who profess a "conscientious objection to participation in war in any form" before he can be given conscientious objector status? In **United States vs. Kauten**, 133 F 2d 703, the Court said:

"The basis of the exemption is the existence of a conscientious scruple against war in any form RATHER THAN AN ALLEGIANCE TO A DEFINITE RELIGIOUS GROUP OR CREED", (Emphasis supplied).

There is nothing in the Statute or regulations which require membership in a sect or organization in order to qualify as a conscientious objector so when a registrant provides sufficient evidence as to his honesty and sincerity and his religious training and beliefs and there is nothing in his file to prove otherwse, then he should be classified as a conscientious objector. **United States vs. Alvies**, 112 F Supp. 618.

Does the religious training and beliefs of the Petitioner qualify him for exemption- What standard must the Appeal Board use to apply Congressional desires and intent respecting conscientious exemption to a specific set of facts embodying one person's claim? The Statutes are silent and so was Congress and this was deliberately so. The spirit of the legislation and the intent of Congress might have been defeated if more rigid statutory formulary had been created since intensity, magnitude and validity of religious training and beliefs are not susceptible to quantitative analysis within defined limits of precision and accuracy. **United States vs. Nelson**, 221 F 2d 623.

The petitioner understands that his religious views are not conventional, and to some may even seem bizarre. The discussion of the Court in the Nelson case shows Congress evidently intended to give us as broad an application of their desires as possible, the only test being that the registrant base his claim on religious training and belief. In **United States vs. Horst**, decided December 12, 1957, in Detroit, Michigan, and as yet unreported, Eastern District of Michigan, Southern Division #36149, Judge Ralph M. Freeman, in granting Defendant's Motion for acquittal (Defendant asserted his claim for exemption was based on the thesis that "God is Love") discussed orthodox and unorthodox religious views and felt constrained to acquit the Defendant of the charge of refusing to submit to induction since the Defendant met the test as to whether his beliefs were religious rather than merely a personal moral code, regardless of their lack of orthodoxy of conventionality. Along these same lines the Court of Appeals for the District of Columbia in an unreported decision filed in December, 1957, unanimously held that an organization which calls itself Washington Ethical Society was a

"religious corporation or society," restoring their tax exemption as such.

The report of the reviewing officer to the Appeal Board was clearly improper and illegal since there was nothing in the file of the petitioner which was incompatible with his proof of exemption. Where it is impossible to determine on exactly what grounds the Appeal Board decided, the reviewing officer's recommendation to them must be legal, otherwise it will be assumed the Appeal Board's action was itself illegal since it considered an illegal recommendation. **Sicurella vs. United States, Supra, citing United States ex rel. Levy vs. Cain,** 194 F 2d 338, 342; **United States** vs. **Balogh,** 157 F 2d 939, 943-44, judgment vacated on other grounds 67 SCT 625; **United States vs. Everngam, Supra.** The petitioner contends therefore, that the Appeal Board's action in classifying him 1-A was illegal, and therefore the trial court should have granted the Petitioner motion of acquittal.

This case also involves interpretation of Selective Service regulations. Local Draft Board #47 ordered the petitioner to report for induction on July 23, 1956 while in his new classification, without first giving the petitioner an armed services physical examination and allowing him the usual 21 day waiting period thereafter before ordering him to report for induction. The act of the Local Draft Board posed the question of whether a registrant whose classification was reopened and considered anew can require that he be afforded all of his administrative remedies and procedures while in this new classification. In short, must a registrant previously classified, and who now gets a new classification be given an armed services physical examination and the 21 day waiting period thereafter before he can be ordered to report for induction?

Section 1625.11, entitled Classification Anew, says as follows:

"When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened."

The Local Draft Board and the Selective Service System for the State of Florida quite obviously acted in accordance with this section and the requirements of Sections 1625.12 and 1625.13 when they permitted the petitioner to file once again all of his appeals provided him by the regulations, and to entertain them, and make rulings on them in accordance with the requirements of the regulations even though these very same appeals had been submitted and ruled upon before in the petitioner's previous classificiation.

After permitting the petitioner to exercise all of his appellate and procedural rights, the Local Draft Board then undertook the unlawful, arbitrary, and oppressive procedure of ordering the petitioner to report for induction without first giving him an armed services physical examination and the customary 21-day minimum waiting period thereafter before ordering him to report for induction. This is clearly contrary to and in violation of Section 1628.10, 32 CFR, page 341, which provides, in part, as follows:

"Who will be examined:—Every registrant before he is ordered to report for induction . . . shall be given an armed forces physical examination under the provisions of his part except that a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

Note that this section requires the physical examination to be given before the order to report for induction is sent to the registrant who is not delinquent or a volunteer. It does not permit a situation wherein the registrant is physically examined at the induction station immediately before his induction after he has been ordered to report there for induction, unless the registrant is delinquent or has volunteered. It is admitted by all parties concerned that the Petitioner is not delinquent nor is he a volunteer.

The order to report for induction was invalid because it also violated, in two ways, the requirements of Section 1631.7, 32 CFR. First, the Petitioner was never mailed a Certificate of Acceptability (DD Form #62) during his current classification since he was not given a physical examination before he was ordered to report for induction; the Local Draft Board therefore, could not legally fix a date for induction. Secondly, the date he was ordered to report for induction (July 6, 1956) was not at least 21 days before the date fixed for induction (July 23, 1956) and, therefore, he was deprived of the 21 day waiting period.

Section 1631.7, 32 CFR states as follows:

"Each local board, upon receiving Notice of Call on

Local Board (SSS Form #201) from the State Director of Selective Service for a specified number of men shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class 1-A and Class 1-A-O and have been found acceptable for service in the armed forces and to whom the Local Board has mailed a Certificate of Acceptability (DD Form #62) at least 21 days before the date fixed for induction. . ."

The entire procedure was also a violation of Section 1625.14 since the Petitioner was not ordered to report for induction in the "usual manner". Instead the very unusual procedure outlined below was used by the Petitioner's Local Draft Board in their effort to induct him. The Government's position relied for authority on paragraph 2(a), Local Board Memorandum #28, issued by National Headquarters, Selective Service System. But paragraph 2(a) of Memorandum #28 could only have valid effect when it is applied to a situation wherein the registrant has already been given a physical examination during his current classification. This conclusion is elementary; if a registrant who is not delinquent or a volunteer has never had a physical examination and was ordered to report for induction this would be in clear violation of the requirements of Section 1628.10, 32 CFR, since the order to report came before his physical examination. But what of an instance where the physical examination was given during a previous classification as in the Petitioner's case? Section 1625.11, 32 CFR requires that this latest classification be treated as an entirely new one. Paragraph 2(a) Memorandum #28 permits a physical examination after the registrant has been ordered to report for induction. Is a physical examination really an im-

portant and necessary step in the chain of administrative events leading to induction? Certainly so, since according to Section 1628.10 a registrant who is not delinquent or a volunteer cannot be ordered to report for induction without first being given his physical examination. The registrant has a right to demand one. **Miller vs. United States**, 169 F 2d 865; **Mason vs. United States**, 218 F 2d 375. Will the physical examination of the Petitioner taken during a previous classification and more than two and one-half (2½) years old, fulfill this requirement? Certainly not, for to permit this would instantly create a violation of Section 1625.11, which requires that a registrant whose classification was reopened and considered anew "shall be classified by the Local Draft Board as if he had never before been classified. Such classification shall have the effect of a new and original classification even though the registrant is again placed in the classification that he was in before his classification was reopened". The requirements of this section are precise. Note the words: "new", "original", "never before been classified". They do not permit a carrying-over of any procedures or administrative actions from other and previous classifications. The Local Draft Board must proceed as if they had never seen or heard of the registrant before. There is no lee-way, no equivocation, no provision for circumvention by permitting opinion of the Local Draft Board to intervene. Its language is that of mandate and finality. There can be no carry-over into the new classification of any previous act or procedure, no matter how small or of apparent unimportance.

Recognizing this then, is there a conflict between the provisions of Section 1625.11 and paragraph 2(a) of Memorandum #28? There is if the Local Draft Board

insists on using the result of a physical examination (or of any other procedure or act) taken of the registrant in another and previous classification. There is none if the Local Draft Board will order a physical examination in proper time during the new classification.

The regulations governing induction must be read together; they are not mutually exclusive nor are they intended to be. **Mason vs. United States**, supra, footnote #7 at 379. Section 1625.11, 32 CFR, requires that when classifications are reopened and considered anew by the Local Draft Board such reclassifications shall be, and have the effect of, a new and original classification. Section 1625.14 provides that after the registrant is classified anew into a class available for service, he shall be ordered to report for induction in the "usual manner". The "usual manner" is described in Section 1631.7 as requiring the Local Draft Board to order for induction only those men who have had a Certificate of Acceptability mailed to them at least 21 days before the date fixed for induction. A Certificate of Acceptability, in a new and original classification, can only be mailed **after** the registrant has successfully passed a physical examination given during the new classification and cannot be mailed before. It is readily apparent that the haste of the Local Draft Board in calling up the Petitioner was prompted by the near approach of his 26th birthday just four days away. Regardless of the urgency to the Local Draft Board, the requirements of Statute must be complied with. Failure by the Local Draft Board to follow the regulations deprived the Petitioner of procedural due process of law. A registrant has the right to pursue his administrative remedies and procedures to the end; therefore an order to report for induction which interrupts these procedures is void. **Tung**

v. U. S. 142 F2d 919. The Local Draft Board should have acted and failed to do so. All orders issued by it thereafter, including the order to report for induction, were invalid. **Tomlinson v. Hershey** etal, 95 F Supp. 73.

The Trial Court, in its opinion dated March 6, 1958, (Appendix B, on page 3 thereof) stated . . . "It cannot be said that there was no basis in fact for the Selective Service Board's classification in this case . . . the views of the (Petitioner) other vegetarians, and the society to which the (Petitioner) belongs, indicate that his beliefs are more of a philosophical nature. The term "religion" is broader than such a philosophy or a merely personal moral code. While each man may find God in his own way, to grant the (Petitioner) an exemption from service on the basis of his "religion of vegetarianism" would open the door to evasion of our Selective Service laws by diverse and unlimited varieties of individual "religious" expression."

(Earlier, on the same page of the opinion (page 3) the Court stated that "he (the Petitioner) admitted that he could serve in the armed forces so long as killing was not required" The Trial Court was in error in this since nowhere in the record of testimony of the Petitioner is such an admission made by him. Indeed, the Petitioner reiterated again and again his reasons why he, because of religious training and belief, could not serve in the armed forces under any circumstances.)

The test the Trial Court used to conclude that the Petitioner's beliefs were not religious in nature but were merely a personal moral code was erroneous per se. What other vegetarians may believe and the beliefs of any so-

cieties to which the Petitioner may have belonged cannot be used as a gauge to determine whether the Petitioner personally conforms within the structures delineated by Congress when they wrote the statute. **U. S. v. Kauten,** supra; **U. S. v. Alvies,** supra; **U. S. v. Everngam,** supra. The test applies to the Petitioner alone and no specific training or duties need be shown to establish conscientious objector status other than his training in his home and by leaders in his religious group. **Riles** v. **U. S.,** 223 F2d 786.

The Trial Court, in its opinion, also gave great weight to what it apparently considered was a bizarre position the Petitioner took respecting his interpretation of Scripture —the words the Court used were "diverse and unlimited varieties of individual religious expression"—and also used that as a test of the Petitioner's religious training and beliefs. That this test is erroneous is readily apparent on its face. The Court endeavors to limit the religious training and beliefs of possible conscientious objector claimants within conventional confines and either disregarded or refused to apply in this case the tests laid down in the Nelson and Horst cases. **U. S. v. Nelson**; **U. S. v. Horst,** supra. The Petitioner may have his own construction and meaning for the Scriptures and is not bound by that of courts (and boards). **Williams** v. **U. S.** 216 F 2d 350.

It is well worth considering what the Court of Appeal for the Fifth Circuit said in **Williams** v. **U. S.** cited supra, and reiterated in **Riles** v. **U. S.** cited supra:

> "If there is no evidence before the board (or the Court) to refute the Defendant's professed be-

lief and if that belief is sincere on his part, then under the Act of Congress he was exempt from training and service. (There is) no such evidence in the record. A thorough reading of the record casts no doubt on the Defendant's sincerity. Congress in its wisdom considered it more essential to respect a man's religious belief, than to force him to serve in the Armed Forces. The draft boards and the courts are bound to carry out that policy."

The Court of Appeal in its opinion, (see Appendix A) on its own motion, decided that the action taken by the local board on October 20th, 1955, regarding the classification of the Petitioner was not a reopening and consideration anew as contemplated by Section 1625.11, 32 C.F.R., but instead was a carry-over of the Petitioner's classification previous granted him in April, 1954. The Court based its result on the premise that the requirements of Section 1625.2, 32 C.F.R. had not been met (pages 5 & 6 of the Opinion). The Selective Service file of the Petitioner (Government Exhibit #1) shows that this result reached by this Court is clearly erroneous.

First, the Appellee (at page 1 of this Brief) never controverted the statement of the case as made by the Petitioner wherein the Petitioner claimed that the act of the local board taken on October 20, 1955, was a reopening and consideration anew of his classification (page 2 of the Petitioner's Brief). The Appellee and the Trial Court have never, at any time past, otherwise argued in brief or orally, or in opinion, and the record is devoid of controversy on this point.

Government's Exhibit #1, on the cover sheet (item #14) under date of September 21, 1955, says as follows:

> "Received letter from Charles R. Tully, Executive Officer, State Headquarters pointing out that Regulations permit board to reopen and reconsider registrant's Classification anew".

The letter referred to above (item #94, Government's Exhibit #1 dated September 20, 1955) addressed to the local board states in part as follows:

> "While the US Attorney cannot now successfully prosecute this case due to the fact that the Appeal Board's handling was in conflict with the decision of the U. S. Supreme Court in the above cited case (United States v. Gonzalez, 348 U. S. 407) and did not conform to the handling prescribed in Operations Bulletin #123 **the Regulations permit you to reopen and reconsider registrant's classification anew. After reclassification registrant is entitled to all rights and privileges which would accrue to him in original classification including right of personal appearance and appeal.**" (Emphasis supplied)

The cover sheet (item #14) under date of October 20, 1955, contains these entries made by the local board:

> "Registrant's file reviewed Board unanimously agreed to reopen classification"
>
> "CLASSIFIED IN CLASS 1-A"

"Form 110, notice of Classification mailed".

In keeping with the instructions received from State Headquarter's in item #94, supra, the local board met, "agreed to reopen classification", Petitioner was "classified in 1-A" and had his "Form 110, notice of classification mailed" (item #14 and see above) and later on was allowed to file an appeal of the classification given him on October 20, 1955. This appeal was addressed to, and filed with, the local board and it was this appeal, which sought to reopen the classification given the Petitioner on October 20, 1955, to which the local board referred when they stated, on January 12, 1956, that they declined to "reopen the classification" (item #15, Government's Exhibit #1), and not the classification granted the Petitioner in April, 1954, as the Appellate Court erroneously believed. (Appendix A, page 5, Opinion of the Court.)

There can be no doubt that the local board and the appeal board intended to reopen and consider the Petitioner's classification anew; they were clearly following the dictates of the letter of September 20, 1955, (item #94) from the State Director of the Florida Selective Service System. The State Director's office should certainly understand Selective Service regulations well enough to know what should be done. If there was no need to reopen the Petitioner's classification, the State Director would have said so and there would have been no need to write the letter of September 20, 1955, (item #94) and use the language quoted above. But the letter was written, the classification was reopened, the Petitioner notified of the new 1-A Classification, and he was allowed to appeal the classification, all in partial or complete compliance with Sections 1625.2, 1625.11, 1625.12 and

1625.13 32 C.F.R. To achieve a contrary result, that is to say, as did the Appellate Court in its opinion, that the local board did not classify the Petitioner anew, in the face of the file of the Petitioner is, the Petitioner respectfully urges, not consonant with the facts as they are, a distinct judicial misinterpretation of heretofore uncontroverted administrative acts which has created new error where none should be, and a needless diffusion and dilution of effective regulations.

If the local board made a conscious effort to comply with the regulations just mentioned, and the record shows that they did, then they should be made to comply with all the regulations that apply. This includes Section 1625.14, 32 C.F.R. which requires that after classification anew the Petitioner be ordered to report for induction in the usual manner; the Petitioner urges that this regulation was not complied with and he was denied procedural due process of law when the local board deviated from the usual manner of inducting registrants by not ordering him to report for a physical examination and giving him the usual 21 day waiting period thereafter **before** ordering him to report for induction (see Sections 1628.10 and Section 1631.7 C.F.R.). This is squarely the point which the Appellate Court felt it need not decide. (Appendix A, page 5 of the Appellant Court's Opinion.)

Before concluding, the Petitioner draws attention to the Appellate Court's statement (on page 4 of its Opinion) with reference to the lack of citation of authority by the Petitioner for the proposition that a failure to provide the second physical examination and the 21 day delay would so materially affect the rights of a selectee as to nullify an order for induction. The Petitioner feels this

is part and parcel of the question the Appellate Court did not decide. The Petitioner believes this point has been sufficiently clarified in this Petition. If not, with the Court's permission, may we here reiterate: a registrant has a right to demand a physical examination before he can be ordered to report for induction, and further, a registrant who is not delinquent or a volunteer cannot be ordered to report for induction without first being given his physical examination and the 21 day waiting period. Sections 1628.10 and 1631.7, 32 C.F.R.; Miller v. United States, supra; Mason v. United States, supra. As a matter of fact, should a registrant fail to report for his physical when ordered he may be considered as delinquent and inducted immediately even if his case is under appeal. United States v. **Hertlein,** 143 F Supp 742. The Petitioner respectfully urges that the mere fact the procedure was spelled out in regulations guarantees the necessity of strict compliance by the local board, not to mention the holding in the cases cited above. The requirement of physical examination before an order to report for induction, among other things, relieves registrants of serious embarrassment and inconvenience and the hardship of making definitive arrangements for cessation of civilian affairs which would be abortive if the registrant were rejected. United States v. Balogh, supra. In the Petitioner's case his last physical examination was more than two years old so that his request that he be physically examined and be given the 21 day waiting period before ordering him to report for induction was not so unreasonable as to shock the conscience. If failure or refusal by a registrant duly to obey an order to report for a physical examination, given in proper time during a classification, is so serious an offense that the registrant can be summarily inducted by the local board, United

States v. Hertlein, supra, then failure or refusal by the local board duly to provide an order for a physical examination in proper time during a classification is equally as serious an offense and a local board's order to report for induction that has omitted this necessary and vital step is a nullity, the induction void, and the entire procedure a denial of procedural due process of law. Tung v. United States, supra.

The decision of the Fifth Circuit, as regards the issue raised by that Court on its own motion, as well as the two questions presented by the Petitioner for decisions, one of which the Appellate Court elected not to decide, present questions that should be resolved in the interests of orderly administration of the Selective Service laws. Certainly the questions are important for future cases of the same type that may arise. This Court should grant the writ and determine the questions.

CONCLUSION

The petition for writ of certiorari should be granted for the reasons above stated.

Respectfully submitted,

LEONARD EDWARD ABEL
Counsel for Petitioner
420 Lincoln Road
Miami Beach, Florida

January, 1959

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17202

MARVIN IRVING TAMARKIN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(November 5, 1958.)

Before RIVES, TUTTLE and JONES, Circuit Judges.

TUTTLE, Circuit Judge: This appeal from a conviction of violation of the Universal Military Training & Service Act, as amended, 50 U.S.C.A. App. 462, presents two questions for our consideration: Did the trial court err in not finding appellant a proper subject for classification as a conscientious objector as described in the Act, and was the conviction of appellant void because

of a failure of the draft board to grant him a twenty-one day waiting period before induction after his last notice of 1A classification?

As to the first question raised on appeal, the Supreme Court has defined the scope of the Court's review of the draft board's classification determinations. The Court said "It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations. *Dickinson v. U. S.*, 346 U.S. 389, 396 (1953). The classifications can be overturned only if 'it has no basis in fact.' *Estep v. United States*, 327 U.S. 114, 122 (1946)." *Witmer v. United States*, 348 U.S. 375.

We have carefully read the record before the draft board upon which alone the trial below must be based, and we conclude that evidence submitted by appellant himself in his initial written statement to the board furnished a basis in fact for the board's decision that appellant's beliefs in vegetarianism represented "essentially political, sociological, or philosophical views, or a merely personal moral code," as distinguished from "belief in a relation to a Supreme Being involving duties superior to those arising from any human relations." 50 U.S.C.A. App. 456(j).

Appellant's second contention arises in the following manner: On April 13, 1954, appellant was classified 1A. He was duly ordered to report for induction after having

been furnished with a certificate of acceptability (D.D. Form No. 62) after his pre-induction physical examination more than 21 days before the date fixed for his induction. He reported but refused to submit to induction. He was reported as delinquent, and prosecution for violation of Selective Service System regulations was recommended. On September 19, 1955, the United States Attorney declined to prosecute on the ground that procedural due process of law had been denied the appellant when he was not given a fair resume of the investigation of his background as made by the F.B.I. *Gonzalez v. United States*, 348 U.S. 407. On October 20, 1955, without further action by appellant or hearing before the board, appellant was notified again of his 1A classification and given an opportunity to appeal to the board for a reopening or rehearing as to his status. He applied for such rehearing within the proper time, and the rehearing was denied by the board on January 12, 1956, the board stating "the board declined to reopen your classification and therefore your file will be forwarded immediately to the appeal board." Thereafter, following the appeal board procedure, which finally resulted in a refusal to change the classification, the local board notified appellant on July 6, 1956, of the appeal board's action and also sent him an order to report for induction on July 23, 1956. On July 26, 1956, the appellant would have become twenty-six years of age, and, therefore, under existing regulations of the Selective Service, ineligible for the draft. Appellant reported for induction but refused to submit to induction.

Appellant claims that upon the final notice to him of the adherence by the local board to its 1A classification,

he was thereafter entitled to a pre-induction physical examination and twenty-one days' delay. This contention is predicated on the provisions of Section 1625.11 of the Selective Service Regulations, 32 C.F.R. 1625.11,[1] and Section 1631.7, 32 C.F.R. 1631.7.[2]

Appellant contends that notwithstanding his having received a certificate of acceptability and his pre-induction physical examination at least 21 days before the date fixed for his earlier induction order, and thus, of course, much more than twenty-one days before the date fixed by the induction order of July 6, 1956, he was nevertheless entitled again to such pre-induction physical examination and twenty-one days' delay after the termination of the appeal procedure which has been recited above.

Appellant cites no authority for the proposition that a failure to provide the second physical examination and the twenty-one day delay would so materially affect the rights of a selectee as to nullify an order of induction.

1 "1625.11 Classification considered anew when reopened. When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened."

2 "1631.7 Action by local board upon receipt of call. Each local board, upon receiving Notice of Call on Local Board (SSS Form #201) from the State Director of Selective Service for a specified number of men shall select, and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class 1-A and Class 1-A-O and have been found acceptable for service in the armed forces and to whom the local board has mailed a certificate of Acceptability (DD Form #62) at least 21 days before the date fixed for induction: . . ."

even though it be assumed that the regulations require such proceedings. We need not decide this point, however, because reference to the regulations themselves compel the conclusion that the local board did not "reopen the registrant's classification" and it did not "again classify the registrant," which alone would bring to bear the provisions of 1631.7, upon which appellant so strongly relies. Section 1625.2 provides the circumstances under which a registrant's classification may be reopened and considered anew. The record of the board which is here before us, clearly shows that neither "upon the written request of the registrant," nor "upon its own motion" did the local board reopen Tamarkin's classification anew at the time it sent him the notice on October 20, 1955, from which he subsequently appealed. In fact he later requested the board to reopen his classification and this request was denied by the board's letter of January 12th, in which it stated "the board declined to reopen your classification." Thus there has been no reopening by the Board as contemplated under

---

"1625.2 When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Section 1625.11, and therefore the rights that would have accrued to Tamarkin if there had been a reopening and reclassification did not arise.

The error underlying appellant's argument on this branch of the case lies in his assumption that the notification sent him by the board on October 20, 1956, (sic 1955) amounted to a reopening and reclassification in the sense in which the terms are used in Section 1625.11.

Concluding, therefore, that there is no merit in the contention that the board's decision lacked a "basis in fact" and that no procedural rights of appellant were denied him, we AFFIRM the judgment of the trial court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NO. 9732-M-Criminal

UNITED STATES OF AMERICA

V.

MARVIN IRVING TAMARKIN

OPINION

This cause came on before the Court for trial upon Defendant's plea of not guilty, and waiver of jury trial. After evidence had been offered, Defendant moved for a Judgment of Acquittal. The case was taken under advisement and briefs submitted by counsel.

The Defendant was indicted and tried for failing, refusing and neglecting to submit to induction on July 23, 1956, and take the oath as required by law in violation of 50 U.S.C. App § 462 (Universal Military Training and Service Act of 1948).

The evidence in this case shows that the Defendant registered under the Selective Service System on September 17, 1949 at the age of 18. On December 19, 1950, he was classified 1-A by his local Selective Service Board. This was followed by various appeals and reclassifications. Finally, on April 13, 1954, he was ordered to report for induction. The Defendant reported, but refused to submit to the induction process. Prosecution was commenced, but then dropped for alleged violation of procedural due process in the administrative classification processes.

On October 20, 1955 the Defendant's classification was re-opened and considered anew. At this time the Defendant was again placed in Class A-1. He appealed his classification on the basis that under his religious beliefs he was entitled to exemption from induction as a conscientious objector. Pursuant to that appeal, he appeared before Mr. Henry K. Gibson, Special Hearing Officer for the Department of Justice. Mr. Gibson prepared a report which was then reviewed by Mr. T. Oscar Smith, Special Assistant to the Attorney General, who recommended that, despite Defendant's belief, he be classified as 1-A. The Appeal Board apparently acting upon this recommendation, and the evidence adduced at the hearing, did not grant the defendant's appeal.

The evidence introduced at the hearings and considered by the Appeal Board indicated that the Defendant has a sincere belief in his cause, and that it was treated by him as a "religion". However, there was other evidence that his "religion", that of vegetarianism, was regarded by other vegetarians as a philosophy and dietary way of life, rather than a religion. The fundamental philosophy of the American Vegetarian Union a non-sectarian organization, to which the Defendant belongs, has been described as the belief that all life is sacred, and that the privilege of taking it belongs only to God. The Defendant asserts a belief in a Supreme Being, and that no animal should be killed for food purposes. His belief further excludes the killing of human beings.

On July 6, 1956, the Defendant was notified of the Appeal Board's decision. At the same time, he received an order to report for induction on July 23, 1956, just three days prior to his 26th birthday, and the age limit for being

inducted into the armed forces. He was not given a new physical examination or allowed the 21 day waiting period subsequent to notion of induction. However, he had received such examination and waiting period in his prior classification and notice of induction.

The Defendant reported at the induction station on the appointed day, but refused to submit to induction.

During the trial before this Court, the Defendant offered testimony as to his "religious" beliefs at all times relevant to this case. He stated that he is opposed to taking animal life for food purposes, and that this belief extends to the slaying of humans. Defendant offered various "bible scriptures" to support his view that the killing of animals was wrong. However, he admitted that he could serve in the armed forces so long as killing was not required.

Section 6(j), Universal Military Training and Service Act of 1948, (50 U.S.C. App. § 456) under which the defendant seeks relief from military service, provides generally that no one shall be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical view or a merely personal moral code.

This Court can overturn the Selective Service System's refusal to grant Defendant conscientious objector

status only upon a showing that their classification was no basis in fact.

It cannot be said that there was no basis in fact for the Selective Service Board's classification in this case, and they could, and did find, that the Defendant's beliefs were not of a religious nature. The views of the Defendant, other vegetarians, and the society to which the Defendant belongs, indicate that his beliefs are more of a philosophical nature. The term "religion" is broader than such a philosophy or a merely personal moral code. While each man may find God in his own way, to grant the Defendant an exemption from service on the basis of his "religion of vegetarianism" would open the door to evasion of our Selective Service laws by diverse and unlimited varieties of individual "religious" expression. Certainly in this case the defendant has not shown that he is opposed to "participation in war in any form", but at best is by reason of dietary training and belief opposed to taking any type of animal life for food purposes, and secondarily because he believes that the vegetarian diet has support in religious words which indicate that killing of animals are wrong. This man can even by his own admission act in a variety of ways in the armed services so long as killing is not required. This he refuses to do. Further he has indicated that his belief rises primarily from dietary training rather than a relationship with a Supreme Being.

It would further appear that Selective Service Regulation 1628, relative to the reclassification of registrants does not of itself require additional physical examinations or certificates of eligibility once such have been given. The appropriate physical examinations were conducted as required by Selective Service and Army Regulations.

From the foregoing, it is the opinion of this Court that there is a basis of fact for the finding and classification of the Defendant as 1-A by the Selective Service System, and further that the defendant was not denied procedural due process by failing to receive a new physical examination and 21 day waiting period prior to induction.

Accordingly, Defendant's motion for Judgment of Acquittal will be denied. The Court finds the Defendant guilty as charged in the indictment.

DATED this 6th day of March, 1958 at Miami, Florida.

EMETT C. CHOATE
UNITED STATES DISTRICT JUDGE

No. 648

FEB 18 1959

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

MARVIN IRVING TAMARKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM ANDERSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,
Department of Justice,
Washington 25, D.C.

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In the Supreme Court of the United States

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No. 648

MARVIN IRVING TAMARKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 72-77; Pet. App. A, 1-6) is reported at 260 F. 2d 436. A previous opinion of the Court of Appeals is reported at 243 F. 2d 108.[1] The opinion of the District Court (R. 4-9; Pet. App. B, 1-5) is not reported.

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[1] In *Tamarkin* v. *Selective Service System, Local Board No. 47*, 243 F. 2d 108 (C.A. 5), certiorari denied, 355 U.S. 825, it was held that, after the petitioner had been classified I-A and denied conscientious objector classification, he was properly denied a preliminary injunction against further procedure by the local board. His contention was that he was entitled to a new physical examination and a 21-day waiting period between a re-determination of physical fitness and the date of induction.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1958 (R. 78). A petition for rehearing (R. 82-84) was denied on December 17, 1958 (R. 98). The petition for a writ of certiorari was filed on January 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a basis in fact for the selective service boards to classify the petitioner 1-A (available for military service), instead of granting the conscientious objector classification sought.

2. Whether, after the reopening of the petitioner's 1-A classification, he was denied procedural due process, when not granted a second pre-induction physical examination and a second 21-day waiting period prior to induction.

STATUTES AND REGULATIONS INVOLVED

Sections 6(j) and 12(a) of the Universal Military Training and Service Act (50 U.S.C. App. 456(j) and 462(a)), the pertinent Regulations of the Selective Service System, and a National Headquarters Memorandum addressed to the Local Boards are set forth in an Appendix to this brief, *infra*, pp. 13-19.

STATEMENT

The petitioner was convicted, in a trial without a jury in the United States District Court for the Southern District of Florida, for refusal to submit to an order for induction into the armed forces of the United States. He was sentenced to imprisonment for a

period of 12 months (R. 2-3, 4, 12-13). On appeal (R. 13-15), the judgment was unanimously affirmed (R. 78).

Pertinent facts shown by the petitioner's selective service file, which was introduced in evidence as Government Exhibit 1 (R. 56-57), are as follows:

On November 13, 1950, the petitioner filed with Local Board No. 47 in Miami, Florida, his classification questionnaire in which he stated he was born on July 26, 1930 (F. 6).[2] After being classified 1-A (available for military service), the petitioner on January 3, 1951, filed with the local board his special form for conscientious objectors (SSS Form No. 150). In this form he stated that he was "conscientiously opposed to the taking of life, whether animal or human, for any purpose whatsoever," and that he believed that his allegiance to the "Eternal Laws of Nature" superseded "man made laws, when the latter involved the taking of life" (F. 133). He mentioned that he had been raised from birth by his parents as a "strict Vegetarian"; that as Secretary of the Vegetarian Society of Greater Miami, he had occasion to voice the principles of this "official body of Vegetarianism"; and that he was a member of the American Vegetarian Union (F. 134, 135). With his SSS Form No. 150 the petitioner submitted a number of pamphlets explaining the principles of Vegetarianism (F. 144, 145, 146, 147). In a publication by the Vegetarian Society of Miami, of which the petitioner was secretary, an article by Dr. I. Shmid entitled "Now Become a Vegetarian," states in part: "There are other advantages in becoming a Vegetarian also. The

[2] The selective service file, a copy of which we are filing with the Court, will be referred to by the designation "F. ——" for the pages numbered in pencil.

Vegetarian is an idealist, a seeker of truth in many fields of human endeavor. He is a lover of life, a humanitarian. He is a social-being. He is brother to all living creatures. He is a friend to all races and nationalities. He strives to live peacefully. He believes in equality for all. He is a lover of nature, an admirer of all the inhabitants of nature" (F. 145-[2, 3-4]). The preamble of the tenets of the Miami society reads in part: "Animal flesh-eating with its attendant slaughter and agony, is revolting to the conscience of mankind. Man's evolutionary intellect precludes murder and misfortune of others in the scheme of his life" (F. 145-[4]). Among the stated aims and objectives of the American Vegetarian Union are "1. To promote the Vegetarian philosophy of life. * * * 3. To emphasize particularly the tremendous influence the application of this philosophy will have on our social and economic life. * * *" (F. 146-[8]).

After a number of administrative orders which are not pertinent here, on April 7, 1954, the petitioner was classified I-A by the appeal board (F. 2), and was continued in this I-A classification by the local board on April 13, 1954 (F. 13). The petitioner passed his pre-induction physical examination on May 13, 1954, and a certificate of acceptability was mailed to him on May 21, 1954 (F. 104, 103, 13). On July 30, 1954, the local board mailed to the petitioner an order to report for induction on August 18, 1954 (F. 101, 13). The petitioner refused to be inducted and was reported to the United States Attorney as delinquent (F. 100, 13). In a letter received from the United States Attorney by the local board on September 19, 1955, prosecution was declined (R. 94, 14). The reason was that the

petitioner had not been furnished with a fair résumé of the investigation of his background as made by the F.B.I. (F. 94).

In a letter from the State Headquarters of Selective Service received by the local board on September 21, 1955, it was stated that although the petitioner could not be prosecuted because of the failure to provide the résumé "* * * the Regulations permit you to reopen and reconsider registrant's classification anew" (F. 94).

On October 20, 1955, the local board in reviewing the petitioner's file "agreed to Reopen" his classification, continued him in I-A, and mailed him Form 110 as notice of this classification (F. 14). The time for appeal was extended by the selective service authorities; and on November 18, 1955, the petitioner took an appeal from the I-A classification (F. 14-15). The following entry appears on the minutes of the petitioner's file for January 12, 1956 (F. 15):

> Appeal was read and considered by the board. Following discussion the members voted unanimously not to reopen classification and clerk was instructed to notify the registrant accordingly by letter, and to forward the file to the appeal board for further review.

The petitioner was advised that the local board declined to reopen his classification and his file was forwarded to the appeal board (F. 15).

In the Department of Justice recommendation to the appeal board dated May 25, 1956 (F. 58-64), the reviewing officer points out that the résumé of the inquiry shows that the petitioner "apparently objects to noncombatant training and service because he does

not believe the military would recognize his status as a noncombatant and would nevertheless train him to kill and because he feels the inoculations would be harmful to him" (F. 61). The résumé also indicated that while persons interviewed generally believed that the petitioner treated Vegetarianism as a religion, many vegetarians considered it to be merely a philosophy (F. 61). The hearing officer found that the petitioner's sincere convictions amounted to a religious belief, and recommended that his claim as a conscientious objector should be sustained. The reviewing officer, however, thought that the views upon which the petitioner based his claim were "essentially philosophical and involve a merely personal moral code" under Section 6(j) of the Universal Military Training and Service Act (*infra*, p. 13), and recommended against sustaining petitioner's claim (F. 63, 64).

On July 2, 1956, the appeal board by a vote of 3 to 0 classified petitioner 1-A (F. 5, 16). On July 6, the local board mailed the petitioner an order to report for induction on July 23, 1956 (F. 42, 16). On July 13, 1956, the petitioner wrote the State Director of Selective Service stating that under the regulations he was entitled, by reason of his new classification, to another physical examination and to a delay of induction for 21 days thereafter (F. 39-41). In a reply dated July 16, 1956, the Deputy State Director pointed out that the petitioner had been given a pre-induction physical examination on May 13, 1954, and that a certificate of acceptability had been mailed to him on May 21, 1954; cited Local Board Memorandum No. 28, Paragraph 2(a), issued by the National Headquarters Selective Service System (*infra*, p. 18), providing that a registrant in the petitioner's position could be ordered to

report for induction and be examined at the induction station; and stated that the petitioner would be expected to report for induction as ordered (F. 38).

On July 23, 1956, the date designated for his induction, the petitioner was given a physical re-examination and found acceptable (F. 25, 26, 32). On that same date he refused to be inducted into the armed forces (F. 23; R. 3-4). His prosecution thereafter followed (F. 16). At the trial in the District Court the petitioner testified that he believed in a Supreme Being as the Spirit of God, and that he considered Vegetarianism a religion. In stating that Vegetarianism was based upon the Biblical commandment, "Thou shalt not kill", he explained, " do not kill animals to eat and I therefore am not disposed to kill humans for any purpose". He also referred to a verse in Genesis 1:29 to the effect that man's food should be vegetables (R. 60). When asked why he was conscientiously opposed to war, he replied that if he were "placed in a position to kill my fellow human beings, [he] would not be able to" (R. 61).

In holding the petitioner guilty, the District Court was of the opinion that it could not be said that there was "no basis in fact for the Selective Service Board's classification in this case, and they could, and did find, that the [petitioner's] beliefs were not of a religious nature." The court held that there was a basis in fact for the petitioner's 1-A classification, and that he had not been denied procedural due process by reason of the failure to receive a new physical examination and a 21-day waiting period prior to induction (Pet. App. B. 4, 5). In affirming the conviction, the Court of Appeals was also of the opinion that there was a basis

in fact for the board's classification and found it unnecessary to reach the procedural point for decision (Pet. App. A, 2-6).

ARGUMENT

1. The petitioner contends that there was no basis in fact, under *Estep* v. *United States*, 327 U.S. 114, for classifying him I-A (available for military service), instead of granting him the conscientious objector classification sought (Pet. 10-18, 24-26).

He argues that he was entitled to classification as a conscientious objector since his sincerity was unquestioned, and there was nothing in his selective service file incompatible with his claim to exemption. The record does not support this premise, however, since documents submitted by the petitioner with his SSS Form No. 150 (see the Statement, *supra*, pp. 3-4) are incompatible with his claim for exemption as a conscientious objector on religious, as distinguished from philosophical, grounds.

The petitioner seeks to avoid the unfavorable effect of these documents by stating that the reviewing officer of the Department of Justice, and presumably the selective service boards also, improperly considered them, even though they were interpretations by other vegetarians as to the true meaning of Vegetarianism instead of the petitioner's individual interpretation. These documents, however, were not produced by selective service authorities to disprove the petitioner's claim that Vegetarianism is a religion; rather, they were produced by the petitioner for the express purpose of proving his claim that Vegetarianism is a religion, which is a valid basis for a conscientious objector classification. One of the publications is by the Vegetarian

Society of Miami, of which the petitioner himself is secretary (F. 145). It cannot be said that the petitioner did not vouch for, and approve, these papers.[3]

These documents submitted by the petitioner show that Vegetarianism is a philosophy or personal moral code, rather than a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation" under Section 6(j) of the Universal Military Training and Service Act (*infra*, p. 13). The preamble of the tenets of the Vegetarian Society of Greater Miami reading in part that "Man's evolutionary intellect precludes murder and misfortune of others in the scheme of his life" (F. 145-[4]) shows that the basis for the objection to killing is "Man's evolutionary intellect," a philosophical concept, not man's "relation to a Supreme Being", the religious concept embodied in Section 6(j). Among the stated objectives of the American Vegetarian Union are the promotion of the "Vegetarian philosophy of life" (F. 146-[8]). The petitioner in his SSS Form No. 150, moreover, states that when man-made laws involving the taking of life are in conflict with the "Eternal Laws of Nature," his allegiance is to the latter (F. 133), *i.e.*, to natural laws rather than to a religious belief in a relation to a Supreme Being.

Vegetarianism cannot be transformed into a religion within the purview of the statute merely because the petitioner sincerely professes to believe that it is such. As the District Court properly held, the petitioner "has not shown that he is opposed to 'participation

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[3] It is significant that the hearing officer found that the petitioner "bases his conscientious objections entirely and solely upon his convictions as a vegetarian *and upon his membership in the Vegetarian Society to which he belongs*" (F. 62, emphasis added).

in war in any form", but at best is by reason of dietary training and belief opposed to taking any type of animal life for food purposes, and secondarily because he believes that the vegetarian diet has support in religious words which indicate that killing of animals are wrong" (Pet. App. B, 4).

2. Neither is there merit to the petitioner's contention that, since he was given a new 1-A designation on October 20, 1955, upon the reopening of his classifiation, he was denied procedural due process because the local board failed to follow the regulations by not granting a second pre-induction physical examination and a second 21-day waiting period prior to induction (Pet. 18-24, 26-31).

The Court of Appeals did not find it necessary to decide this procedural point, since upon the record the court did not find that there had been a reopening of the petitioner's I-A classification on October 20, 1955, within the meaning of 32 C.F.R. 1625.2[4] (Pet. App. A, 4-6). The petitioner strongly contests this view by insisting that there was a reopening of his classification. The record is unclear as to precisely what occurred, but the entries dated October 20, 1955 (F. 14), support the petitioner's contention that there was a reopening and classification anew. However, even if the petitioner's version is accepted we do not think it can be said that the regulations were not followed.

It is undisputed that the petitioner passed his pre-induction physical examination on May 13, 1954, was mailed a certificate of acceptability on May 21, 1954, and was mailed an order to report for induction on

[4] The selective service regulations hereafter referred to are set out at pp. 15-18, *infra*.

August 18, 1954 (see the Statement, *supra*, p. 4). There is thus no dispute about the fact that he has had a pre-induction physical examination and a 21-day waiting period many days before the order to report for induction on July 23, 1956, upon which his conviction was ultimately based. There is no requirement in the statute or the regulations that there be a new physical examination and a new 21-day waiting period each time a registrant's classification is considered by a selective service board. To the contrary, the memorandum issued by the National Headquarters Selective Service System (*infra*, pp. 18-19) provides that physical examinations shall be valid for 120 days, and that when more than 120 days have passed, as in this case, a registrant shall be ordered to report for induction at which time he shall be given a new physical examination.[5] The terms of this memorandum are controlling and dispositive of the petitioner's argument. It is significant that the petitioner does not claim a physical disability which would make him ineligible for military service, and that he was in fact given a physical re-examination and found acceptable on July 23, 1956, the date upon which he was ordered to report for induction (F. 25, 26, 32).

The petitioner's argument attempts to read into the framework of the various regulations requirements which are neither expressly nor impliedly included. Under the regulations referring to classification anew, 32 C.F.R. 1625.12 provides for the mailing of a new Notice of Classification (SSS Form No. 110); and 32 C.F.R. 1625.14 provides for cancellation of the old Order to Report for Induction (SSS Form No. 252) before a

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[5] Cf. *Mason* v. *United States*, 218 F. 2d 375 (C.A. 9).

new order is mailed. The purpose is obviously to make certain that the new classification is given a full review such as the petitioner had in this case.

None of the regulations, however, contains a provision that, upon classification anew, a previous preinduction physical examination, and the certificate of acceptability (DD Form No. 62) mailed to a registrant pursuant thereto, should be cancelled so as to necessitate repetition of the procedure. If it had been the purpose of the regulations to require this, as the petitioner contends, it is reasonable to infer that express provisions to this effect would have been included, as they were in the other instances mentioned.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

FEBRUARY 1959.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

Section 6 (j) [50 U. S. C. App. 456 (j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the

local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Section 12 (a) [50 U. S. C. App. 462 (a)]:

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse

to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Regulations of the Selective Service System:

32 C.F.R. 1625.2:

When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification: provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

32 C.F.R. 1625.4:

Refusal to reopen and consider anew registrant's classification. When a registrant, ~~any~~ person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

32 C.F.R. 1625.11 provides:

Classification considered anew when reopened. When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

32 C.F.R. 1625.12 provides:

Notice of action when classification considered anew. When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of § 1623.4 of this chapter.

32 C.F.R. 1625.13 provides:

Right of appeal following reopening of classification. Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

32 C.F.R. 1625.14 provides:

Order to report for induction to be canceled when classification reopened. When the local board has reopened the classification of a registrant, it shall cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner.

32 C.F.R. 1628.10 provides:

Who will be examined. Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or

interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination.

32 C.F.R. 1631.7 provided in pertinent part:

Action by local board upon receipt of notice of call. (a) Each local board, upon receiving a Notice of Call on Local Board (SSS Form No. 201) from the State Director of Selective Service for a specified number of men shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class 1-A and Class 1-A-O and have been found acceptable for service in the armed forces and to whom the local board has mailed a Certificate of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction: * * *.

National Headquarters Selective Service System, Local Board Memorandum No. 28, issued Dec. 28, 1950, amended March 12, 1957, provides in pertinent part:

1. *Period of Validity Under Paragraph 18a, AR 601-270.*—Paragraph 18a of Section III of Army Regulations No. 601-270 provides in pertinent part as follows:

18. *Scope of induction processing.*—a. Selective Service registrants found acceptable for military service normally will be ordered to report to induction stations in not less than 21 and not more than 120 days after the preinduction examination. If the lapse of time between the preinduction examination and the appearance of the registrant

for induction is more than 120 days, another complete physical examination is required to determine acceptability and immediate induction thereafter, except as provided in (1) * * * below—

* * * * *

2. *Action by Local Board.*—(a) Except in the cases of postponed registrants, the 120-day period of validity continues in effect for armed forces physical examinations. However, when a registrant whose physical examination is more than 120 days old is selected for induction, the local board shall not order him to report for armed forces physical examination but shall order him to report for induction. In each such case the registrant will receive a complete examination at the armed forces induction station and when found acceptable will be immediately inducted.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 648

MARVIN IRVING TAMARKIN

Petitioner

vs

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITION FOR REHEARING

LEONARD EDWARD ABEL, ESQ.
Attorney for Petitioner
420 Lincoln Road
Miami Beach, Florida

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PETITION FOR REHEARING

The first point the Petitioner raises regards the contents of the relatively long statement of the Respondent (Pages 2 to 8 in the Brief of the Respondent) concerning certain publications contained in the Selective Service File of the Petitioner. Nothing within the Statement indicates that these publications were submitted by the Petitioner when he personally appeared before the local board in March, 1951.

At that personal appearance, the Petitioner, along with other witnesses, gave oral testimony to the local board and it was on the basis of this oral testimony more than the publications brought by the Petitioner to that hearing, that prompted the local board to grant the Petitioner's claim as a conscientious objector and so classi-

fied him unanimously. The brief of the Government omits this very significant fact. The conscientious objector classification remained in effect until the board removed it on December 6, 1951, a period of nine and a half months. The Petitioner was reclassified after the State Headquarters of Selective Service system in a letter dated November 20, 1951 (Item #124, Government's Exhibit #1) stated that, "It is our opinion that he should be classified either 1-A or 1-A-O". The local board then reclassified the Petitioner in accordance with the opinion of the State Headquarters of Selective Service.

The point here is that it would be an improper conclusion to assume that it was the nature of these publications alone which prompted the local board to grant the Petitioner CO status. The unreported testimony of the Petitioner before the local board, the benefit of which was not available to the State Headquarters of Selective Service when it rendered its opinion to the local board in the letter cited supra, was fully controlling of the decision of the local board at the time it granted CO status to the Petitioner.

On page 9 of the Respondent's brief, the Government says, "Vegetarianism cannot be transformed into a religion within the purview of the statute merely because the Petitioner sincerely professes to believe that it is such." The arrant assumption of the Government apparently disregards the countless millions of the Far East to whom Vegetarianism is a way of life by virtue of its being the essence of their religion. Eminent western authorities such as Dr. Albert Schweitzer in his book "Out of My Life and Thought" at Page 230 et seq thoughtfully discusses why his beliefs in vegetarianism is a reverence

for life which is indeed a reverence for all life with "no dividing line between higher and lower, between more valuable and less valuable life . . . The concept for reverence of life has, therefore, a religious character. The man who avows his belief in it and acts upon the belief shows a piety which is elemental." The Government's knowledge of the precepts of Vegetarianism is not so complete nor so profound so as to permit it to make such a unilateral judgment as that expressed in their brief, supra. Nevertheless, the admission of the Government that the Petitioner sincerely professes a religious belief is entirely consonant with the Petitioner's reverence for life which is the elemental basis for the beliefs of all vegetarians who believe in it as a religion. This admission is extremely significant, as shall be shown.

The essential test is not whether Vegetarianism is a religion within the purview of the statute (Section 6J of the Universal Military Training and Service Act; see page 6, Brief of Petitioner). The statute in no way attempts to define acceptable and non-acceptable religions, but on the contrary, places the test squarely upon the individual's belief in relation to a Supreme Being, involving duties superior to those arising from any human relation. Nothing here allows any administrative or judicial trier of fact to decide which beliefs are amenable for consideration for conscientious objection because they are within a compass of conventional concepts of religion and which beliefs are ill-considered because they are not supported by a personally acceptable faith or creed, personally acceptable to the trier of fact, that is.

None of the bodies before whom the Petitioner appeared, be they administrative, quasi-judicial, or judicial,

has ever doubted the sincerity of the Petitioner in his religious beliefs. To deny CO status because it was subjectively decided that Vegetarianism is not a religion, and, therefore, does not come within the requirements of Section 6J, is to allow a dichotomous interpretation of this vital Section to encroach on the intent of Congress when it passed this Statute. It is the individual's beliefs that must be tested, not the creed to which he adheres. UNITED STATES v. KAUTEN, 133 F 2nd 703 (C.A. 2). Congress never intended otherwise—wisely—for it is obvious the test is susceptible to personal prejudice. The KAUTEN case set the law of the land respecting Section 6J. The Court below, by affirming the Trial Court on the evidence submitted, has created a direct conflict of law between the Fifth Circuit and the overwhelming weight of authority of other Circuits as well as this Court. This Court should resolve this conflict by reversing the Court below.

The second point upon which the Petitioner seeks rehearing is to point out to the Court the effect of the holding of the Court below regarding a decisive issue raised ex mero motu in their opinion, reported at 280 F 2d 436; Petitioner's Brief, Appendix A, Page 1-6.

To acquaint the Court with the factual background, Petitioner will first refer the Court to a companion case brought previously by the Petitioner entitled TAMARKIN vs SELECTIVE SERVICE SYSTEM LOCAL DRAFT BOARD #47, 243 F 2d 108 (C.A. 5), certiorari denied without opinion by this Court at 355 U.S. 825.

In this case the Circuit Court of Appeals in a very brief opinion refused to entertain an appeal on the ques-

tion of the right of a registrant to enjoin his local board when it had been alleged that the local board was proceeding illegally by denying the Petitioner procedural due process of law, said Petition for an injunction having been brought prior to the exercise by the registrant of all of his administrative remedies and procedures.

The Court of Appeals felt that the allegations could only be used as defenses in a criminal prosecution against the registrant for refusal to submit to induction, provided the registrant had first exhausted all of his administrative remedies and procedures; the Court cited WITMER v. UNITED STATES, 348 U.S. 375, 75 S Ct. 392 and WATKINS v. RUPERT, 224 F 2d 47 (C.A. 2). These cases were attacks by registrants upon the result reached by the local boards on their draft classifications, and their petitions to enjoin the local board were based upon the allegation that their draft classifications were incorrect; their Petitions were not based upon the allegation that they had been denied procedural due process of law as was alleged by the Petitioner herein. The Court below, in the first case brought by Tamarkin (243 F2d 108; C.A. 5) affirmed the result of the District Court on jurisdictional grounds, stating, "There is no right to a direct judicial review of orders of the Draft Boards." This Court denied certiorari without opinion at 355 U.S. 825. (Compare the holding in TOWNSEND v. ZIMMERMAN, 237 F 2d 376 (C.A. 6) which is contra.)

The net result of the Appeal and the Petition for Writ of Certiorari brought by Tamarkin in his first case was to leave open the question of whether there was a denial of procedural due process of law since no Appellate authority has thus far reviewed the District Court on

this question. In the criminal prosecution from which this present appeal is being taken, the Petitioner raised the defense of a denial of procedural due process of law for the reasons given in his brief (Pages 18-24, Brief of Petitioner). These reasons were the same as those made by Tamarkin in his first case. The District Court again held that there was no such denial; this holding was consistent with the previous holding of the District Court from which the previous appeal had been taken. Since the Court of Appeals in its opinion refused to pass on the question raised by the Petitioner (Petitioner's Brief Appendix A, pages 1-6) and this Court again denied certiorari without opinion, the question of the denial of procedural due process of law as raised by the Petitioner has never had appellate review. The orderly administration of Selective Service regulations requires that this question be reviewed, otherwise the appeals process so painstakingly set forth in the regulations could be circumvented and made a matter of administrative grace because the holding of the Court below will now allow a local board to assert that the result of a review of a classification was not the reopening and consideration anew contemplated by the regulations, but a carry over of a previous classification. This is wholly at odds with the intent and meaning of the regulations (Sections 1625.11, 1625.12, 1625.13, 1625.14, 32 C.F.R.; pgs 3-4 Brief of Petitioner) and deliberately infuses what these regulations sought to prevent. This repelling result should be rejected by this Court. To allow this error to stand uncorrected will impart an instability to the regulations not intended by Congress or the administrators of the Selective Service System and places the Court below in conflict with virtually every other Appellate jurisdiction.

The Government urges that the Petitioner is not entitled to a physical examination and a 21 day waiting period thereafter before he was ordered to report for induction because this procedure had already been performed in a previous classification and the regulations do not spell out that a new physical and the waiting period must be given to the registrant every time his classification is re-opened and considered anew. This argument might have merit were it not for the requirements of Sections 1625.11 and 1628.10 32 C.F.R. and the holdings in case law since the regulations were written. (See Page 4 and 5 of Petitioner's brief for regulations cited.)

In UNITED STATES v. GONZALES, 348 U.S. 407, this Court held that a registrant is entitled to receive a fair resume of the investigation made by the Federal Bureau of Investigation regarding his background in order to afford him an opportunity to answer any derogatory representation contained therein. This requirement for submission of the resume is not a part of the regulations. Yet would the Government say that an Appellate process which deletes the submission of this resume to the registrant would not be defective because it is not in the regulations? To go a step further: Would the Government say that no defect exists when a classification has been re-opened and considered anew, the registrant reinvestigated, but the resume of this second investigation was not given to the registrant because he had been given another one before, in a previous classification?

I am sure that the Government would not want to defend this untenable position, yet it adopts this position collaterally when it argues that a physical examination and the waiting period given in an older classification

can be used in a re-opened and reconsidered classification, because the regulations do not say that the physical examination and the waiting period must be given again. On the contrary, the regulations do require re-examination and the waiting period (cf. pg. 30-31, brief of the Petitioner and regulations and cases cited thereunder; UNITED STATES v. BALOGH, 157 F2d 939, judgment vacated on other grounds, 67 S Ct 625).

The regulations as written do not spell out each and every procedure to be followed by the Selective Service System in re-opened and reconsidered classifications; the intentions of the promulgators were amply covered by the provisions of Section 1625.11, cited supra, and no attempt to twist the English language and the elemental simplicity of its requirements as stated in this regulation can alter its intended effect that a classification, when re-opened and considered anew, must be treated as a new one and as if the registrant had never before been classified. This, to me, means that draft boards, to induct a registrant, must again include **all** of the administrative steps, **bar none**, leading to induction.

When this Court denied certiorari without opinion it gave its stamp of approval to the ruling of the Court below respecting this question, the Court below having decided that the Petitioner's classification was not re-opened and considered anew, but was merely a carry over of a previous classification. The Government concedes at Page 10 of its brief that this ruling was clearly erroneous in that the Petitioner's classification had indeed been re-opened and considered anew by his local board. The ruling of the lower Court has placed it squarely in conflict with the Selective Service System in

the administration of its regulations. (Heretofore the record was devoid of any argument on this point, all parties having agreed that the Petitioner had been reclassified.) In the light of the concession on the part of the Government that the Appellate Court misconstrued the act of the Selective Service System regarding the Petitioner's classification, this misconstruction opens the door leading to administrative injustice. This Court should resolve the error created by the Fifth Circuit by its ruling and reverse on this question also.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for Writ of Certiorari filed by the Petitioner herein should be reheard and said Petition granted.

LEONARD EDWARD ABEL
Attorney for Petitioner

I hereby certify that a true copy of the foregoing Petition for Rehearing was served upon the Solicitor General, Department of Justice, Washington, 25, D. C. on the _____ day of March, A.D. 1959, by air-mail.

LEONARD EDWARD ABEL
Attorney for Petitioner

I hereby certify that a true copy of the foregoing Petition for Rehearing was served by hand upon the United States District Attorney for the Southern District of Florida, at the Federal Courthouse, in Miami, Florida, on the _____ day of March, A.D. 1959.

LEONARD EDWARD ABEL
Attorney for Petitioner